D.C. Circuit Upholds SO2 NAAQS, Shifting Focus To Implementation Plan

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Recent industry calls for EPA to launch a rulemaking to implement the sulfur dioxide (SO2) national ambient air quality standard (NAAQS) and set requirements for determining compliance could gain new traction now that a federal appeals court has upheld the standard.

The U.S. Court of Appeals for the District of Columbia Circuit ruled July 20 in *National Environmental Development Association's Clean Air Project, et al. v. EPA to* dismiss industry and states' challenge to the standard's implementation requirements on account that they are not final action, while siding with EPA on the science supporting the standard.

While the court upheld the standard, industry groups are already asking the Supreme Court to consider the issue in a separate case. Backed by the American Petroleum Institute (API), a Montana chemical and fertilizer company is asking the high court to overturn a 9th Circuit ruling, *Montana Sulphur & Chemical Co. v. EPA*, that they says sets a negative precedent giving EPA "unbridled power" to direct states on how to curb SO2 pollution based on computer modeling.

Environmentalists, however, welcomed the court's ruling. "Today's judicial decision strongly affirms that EPA's clean air protections addressing dangerous sulfur dioxide are firmly grounded in science and the law," Peter Zalzal said in a statement.

The suit in the D.C. Circuit targeted EPA's June 2010 SO2 NAAQS, which set a standard of 75 parts per billion (ppb), averaged over one hour, which is significantly stricter than the 24-hour standard of 140 ppb and annual standard of 30 ppb that it replaced.

States and industry argued that the final rule unlawfully required states to use both air quality computer modeling and monitoring data to demonstrate attainment -- a requirement EPA has not previously imposed for the SO2 standard. The industry and state petitioners in the case charged that EPA's inclusion of modeling requirements violated rulemaking procedures because the agency did not first take comment on that approach in the proposed version of the rule. But EPA contended that the standard only lays out a possible course for how EPA could implement the standard using modeling and monitoring, and thus does not constitute final agency action subject to judicial review.

The agency also in recent months has walked back aspects of the modeling provisions for states implementing the standard, recently saying that states do not have to include modeling demonstrations when they submit infrastructure state implementation plans (SIPs) for meeting the NAAQS, which are due in June 2013, and issuing a draft white paper outlining a host of options for implementing the standard.

In recent comments on the white paper, industry groups strongly urged EPA to launch a rulemaking to implement the NAAQS, including methods for determining attainment. EPA held private meetings with activists, industry and states to discuss the paper, aiming to address challenges facing areas deemed "unclassifiable" for the purposes of determining whether they are attaining the standard.

UARG Comments

In June 29 comments on the draft document, the Utility Air Regulatory Group (UARG), representing electric utilities, says that "the approach to be used for implementation of the 1-hour SO2 NAAQS is a key part of that ambient standard and must be subject to notice-and-comment rulemaking."

UARG argues that numerous aspects of the SO2 NAAQS are subject to rule requirements, including "a methodology that is to be used to determine compliance with the standard, e.g., through the use of measurements from air quality monitors or through computer modeling predictions of pollutant concentrations. Changing any one of these components can substantially change the standard's stringency."

That view is shared by several other industry groups -- EPA in its summary of its June 1 meeting with industry about the white paper says that industry "stated that rulemaking with a comment period is necessary for defining requirements to address sources in unclassifiable areas; guidance alone would be inadequate."

Elsewhere in comments, industry is also urging EPA to address concerns over its use of the AERMOD modeling system, which they argue can overestimate emissions and wrongly place areas out of attainment with the standard. But at the same time, some industry groups, along with some states, are expressing support for EPA to prioritize implementation efforts around the largest sources of SO2 emissions, likely coal-fired power plants.

Environmentalists and other states counter that because of the 2010 NAAQS' short averaging time, and the unpredictable characteristics of SO2 plumes, it is not possible to reliably determine compliance using a sparse network of SO2 monitors, thus making modeling an important tool to evaluate attainment of the standard and at the very least place monitors in the best location.

'No Final Action"

In the D.C. Circuit's July 20 ruling upholding the NAAQS, Chief Judge David Sentelle agreed with EPA that the court does not have jurisdiction to consider the industry's arguments "because the challenged statements do not constitute final agency action."

He said that the modeling requirements do not meet the court's test under 1997's *Bennett v. Spear* for what constitutes "final" action – that the action "mark the consummation of the agency's decisionmaking process," and that the action be "one by which rights or obligations have been determined, or from which legal consequences will flow."

Noting that EPA did not impose "definite requirements" on states or industry, Sentelle says that "EPA explained that it expected to make initial attainment designations in 2012 based on existing monitoring capabilities, as well as 'any refined modeling the State chooses to conduct specifically for initial area designations.' That language does not impose new legal obligations to use modeling."

Sentelle also says that "Petitioners will be free to challenge any final action EPA takes that imposes an obligation

Petitioners must meet."

During May 3 oral arguments in the case, Sentelle along with Judges Brett Kavanaugh and Douglas Ginsburg appeared skeptical of claims that EPA violated rulemaking procedures by including the modeling requirements. Sentelle asked attorney Paul Seby, representing North Dakota and other states, whether a footnote included in the final SO2 NAAQS "more than strongly" suggested that only monitoring could be used to show attainment.

The footnote says that "EPA anticipates making the determination of when monitoring alone is 'appropriate' for a specific area on a case-by-case basis, informed by that area's factual record, as part of the designation process," going on to say that such consideration would be based on prior SO2 designations, whether monitoring is "the more technically appropriate tool for determining compliance" and other factors.

Seby responded that the example used in the footnote -- a shipping port -- would not affect North Dakota or other states that do not have such facilities, although he conceded that there could be other possibilities. Sentelle also pressed Seby on whether it was correct to say that EPA had issued “marching orders” for states to include modeling for attainment designations, asking him “is that the best you have?”

The D.C. Circuit in the decision also upholds EPA's setting of the SO2 NAAQS at 75 ppb and denies several industry challenges to the science underpinning that level, including the argument that EPA “cherry-picked” studies in its setting of the SO2 NAAQS that would support a stricter standard. Sentelle in the decision finds EPA offers a “reasonable explanation” of why it choose the studies it did, and that “we cannot conclude that the choice EPA made to give especial weight to the three studies conducted in the United States that accounted for the effects of SO2 concentrations using multi-pollutant regression models was arbitrary or capricious.”

The court also sides with EPA over industry's argument that the agency should have considered present air quality in setting the standard. Sentelle writes that nothing in the air law “requires EPA to give the current air quality such a controlling role in setting NAAQS. And as Petitioners themselves note, the CAA gives EPA significant discretion to decide whether to revise NAAQS.”

The ruling echoes the D.C. Circuit's July 17 ruling upholding EPA's nitrogen dioxide NAAQS, where Ginsburg, writing for a separate panel, found the agency was within its discretion in its scientific determinations and the court lacked jurisdiction to review alleged permit requirements because they were not “final.”